87-367

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

BENDIX AUTOLITE CORPORATION,

Appellant,

—v.—

MIDWESCO ENTERPRISES, INC.,

Appellee.

INTERNATIONAL BOILER WORKS COMPANY,

Third Party Defendant.

APPEAL FROM THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JURISDICTIONAL STATEMENT

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THE QUESTIONS PRESENTED

1. Does the Ohio tolling statute (Ohio Rev. Code § 2305.15) impermissibly burden interstate commerce by denying foreign corporations the protection of the statute of limitations during such times as they cannot be served with process within the state?

2. Does the aforesaid tolling statute impermissibly burden commerce with respect to claims arising from contract, for which the tolling of the statute of limitations can be avoided by including in the contract itself a provision authorizing in-state service?

3. Should the decision invalidating the above statute have been given only prospective effect?

THE PARTIES

The plaintiff-appellant in this action is Bendix Autolite Corporation ("Bendix"), which as of March 29, 1985 was merged into The Bendix Corporation and ceased its separate existence. The Bendix Corporation was merged into Allied Corporation ("Allied") on April 1, 1985 and likewise ceased its separate existence.*

The defendant/third-party plaintiff-appellee is Midwesco Enterprises, Inc. The third-party defendant is International Boiler Works Company.

Anthony Celebrezze, Jr., the Attorney General of the State of Ohio, is being included as a respondent pursuant to the Rule 28.4(c) of the Rules of the Supreme Court of the United States.

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* Allied is a wholly-owned subsidiary of The Signal Companies, Inc., which in turn is a wholly-owned subsidiary of Allied-Signal Inc. The subsidiaries of Allied (other than wholly-owned subsidiaries) are Akebono Kohsan Co., Ltd. (Japan); Akebono S.A. (Japan); Allied Automotive Ltd. (Brazil); Allied-General Nuclear Services (Delaware); Bendix Electronic Service Corporation (Spain); Bendix France, S.A. (France); Bendix Group Superannuation Pty., Ltd. (Australia); Bendix Italia, S.p.A. (Italy); Bendix Mintex Proprietary Limited (Australia); Bendix-Jidosha Kiki Corporation (Delaware); Bunker Ramo Electronic Data Systems S.A. (Spain); France Automobile Service, S.A. (France); Garrett Comtronics Licensing Corp. (Texas); Identitech Corporation (Delaware); Iminor, S.A. (France); Industrial Turbines International Inc. (New Jersey); Ingold Electrodes, Inc. (Massachusetts); International Turbine Engine Corporation (Delaware); La Decoration Moderne, S.A. (France); Leaseway All-Services, Inc. (Delaware); Manbritt Industries, Inc. (New York); Mitsuwa Construction Co. (Japan); Nikki-Universal Co., Ltd. (Japan); Nippon Amorphous Metals Co., Ltd. (Japan); Nippon Brake Safety Institute (Japan); Oak Mitsui Inc. (New York); Propelentes Mexicanos, S.A. (Mexico); Sanzillon-Clichy, S.A. (France); Serind S.p.A. (Italy); Sifra Industrie, S.A. (France); Sistemas Bendix de Seguridad S.A. de C.V. (Mexico); Societe Civile Immobiliere Prieur & Cie (France); Societe Wheelabrator-Allevard S.A. (France); Sofratype, S.A. (France); Sonic Oil Separation, Ltd. (Canada); Tecpro Industrial Chemicals Ltd. (United Kingdom); Turbo Services SNC (France); UM Holding B.V. (Netherlands); UMMS Caribbean N.V. (Aruba); UMP Chemicals, S.A. (United Kingdom).

This is a proceeding wherein the constitutionality of a statute of the State of Ohio has been drawn in question. The lower courts did not, pursuant to 28 U.S.C. Section 2403(b), certify to the Attorney General of the State of Ohio the fact that the constitutionality of Ohio Revised Code Section 2305.15 was drawn in question.

Copies of this Jurisdictional Statement are also being served on counsel for all parties in the companion case of *Copley v. Heil-Quaker Corp.* One of the parties in that case (Heil-Quaker Corp.) appeared below as *amicus curiae* in this case.

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TABLE OF AUTHORITIES

OPINIONS BELOW

The opinion of the Court of Appeals for the Sixth Circuit affirming the granting of summary judgment dismissing the complaint is reported at 820 F.2d 186 (1987). The Memorandum and Order of the Federal District Court for the Northern District of Ohio granting summary judgment is not reported. The opinion of the same District Court in the companion case of *Copley v. Heil-Quaker Corp.* is likewise not reported. Copies of the referenced opinions are included in the appendix.

STATEMENT OF JURISDICTIONAL GROUNDS

This is an appeal from a decision by the United States Court of Appeals for the Sixth Circuit declaring a particular statute (the so-called Ohio tolling statute—Ohio Rev. Code § 2305.15) to be invalid under the Commerce Clause of the United States Constitution.

The statutory basis for jurisdiction is 28 U.S.C. § 1254(2), relating to decisions by a court of appeals holding a State statute to be invalid as repugnant to the United States Constitution.

The Court of Appeals rendered its decision affirming the District Court on June 3, 1987. Notice of appeal was filed on August 26, 1987 in the United States Court of Appeals for the Sixth Circuit.

CONSTITUTIONAL PROVISIONS AND STATUTES

The decisions of the lower courts were based on Article I, Section 8 of the United States Constitution (the Commerce Clause) giving Congress the power

> ". . . to regulate Commerce with foreign Nations, and among the several States, and with Indian Tribes".

The State statute declared to have been unconstitutional is the Ohio tolling statute, Ohio Revised Code Section 2305.15, which reads as follows:

When a cause of action accrues against a person, if he is out of state, or has absconded, or conceals himself, the period of limitation for the commencement of the action as provided in sections 2305.04 to 2305.14, inclusive, and sections 1302.98 and 1304.29 of the Revised Code, does not begin to run until he comes into the state or while he is so absconded or concealed. After the cause of action accrues if he departs from the state or absconds or conceals himself, the time of his absence or concealment shall not be computed as any part of a period within which the action must be brought.

STATEMENT OF THE CASE

Plaintiff-appellant Bendix in this action seeks to recover damages for breach of contract and fraud arising out of a written agreement under which defendant-appellee Midwesco sold and installed a coal-fired boiler system at Bendix' manufacturing facility in Fostoria, Ohio. This system was placed in service in July 1975 and the action was commenced in December of 1980.

Midwesco moved for summary judgment, claiming that Bendix' right of action was barred by the four-year statute of limitations fixed by Ohio Rev. Code § 1302.98 for contract actions, and by Ohio Rev. Code § 2305.09(c) for fraud actions. It was conceded that Midwesco was not authorized to do business in Ohio and had not appointed an agent for the service of process.

By decision and order dated April 27, 1983, the District Court denied Midwesco's motion insofar as it sought to interpret the tolling statute as not applicable because Midwesco was continually subject to the jurisdiction of the Ohio courts through long-arm service. The District Court's holding in that regard has never been appealed and is no longer in issue.

As part of the same decision, however, the court held in abeyance its decision on whether the tolling statute imposed an impermissible burden on commerce or was otherwise unconstitutional, noting that the same issue had also been raised in the case of *Copley v. Heil-Quaker Corp.*, which was then pending before it. The Court arranged for the oral argument of both cases in a single hearing.

Thereafter and on March 8, 1987, the District Court rendered decisions in both the present case and the companion (*Copley*) case, in each case dismissing the complaints on the ground that the Ohio tolling statute impermissibly burdened interstate commerce. In both cases appeals were taken to the Court of Appeals for the Sixth Circuit, which affirmed both decisions. The decision in the case of Bendix was rendered on June 3, 1987.

Plaintiff-appellant argued in both the District Court and the Court of Appeals that there was no impermissible burden on commerce, and specifically argued that Midwesco could have avoided the detrimental effect of the tolling statute either by including in its contract with Bendix a provision designating an agent on whom Bendix might serve process for claims related to that particular transaction, or by filing a designation with the Secretary of State, notwithstanding that it had not qualified to do business within the state.

THE QUESTIONS ARE SUBSTANTIAL

The "Commerce Clause" questions here presented for appellate review include all of the questions which this Court held it was procedurally prevented from answering in *G.D. Searle & Company v. Cohn*, 455 U.S. 404 (1982), and which necessitated a remand of that case for further proceedings. The most fundamental of these federal questions is also the very same question which Chief Justice (then Mr. Justice) Rehnquist, in his opinion dissenting from this Court's denial of certiorari in *Honda Motor Co. v. Coons*, 469 U.S. 1123 (1985), insisted this

Court should have reviewed on a purely discretionary basis. (That dissenting opinion by Chief Justice Rehnquist is hereinafter cited as the "Honda dissent".) At the same time, this case presents separate federal questions not presented in *Honda* which are shown to be substantial on the basis of *Searle*, thus making this case more substantial than *Honda*.[1]

This case, like *Searle* and *Honda*, involves a state statute which under certain circumstances tolls the running of the statute of limitations against foreign corporations and thus extends the period during which they are vulnerable to suit. *Searle* and *Honda* examined a particular New Jersey statute which specifically targeted foreign corporations and (as eventually interpreted by the New Jersey Supreme Court following this Court's remand in the *Searle* case) totally denied them the protection of the statute of limitations unless they first obtained a certificate of authority to do business in that state. (See Honda dissent, 469 U.S. at 1125—footnote.)

The analogous statute in this case (Ohio Rev. Code § 2305.15) serves essentially the same function as the New Jersey statute but does not single out corporations as such, and instead applies categorically to all parties who cannot be served within the state. The Ohio statute also differs from the New Jersey statute in that it has never been authoritatively interpreted as providing foreign corporations with only a single alternative to prolonged exposure to lawsuits, *i.e.*, the alternative of qualifying to do business within the state, which would thereupon subject them to the unlimited jurisdiction of that state, notwithstanding the possible absence of the minimum

1 In all proceedings in both of the lower courts, this case has been argued jointly with the previously referenced case of *Copley v. Heil-Quaker Corp. et al.*, Case Number 87-170. Although the identity of issues is not total, plaintiff-appellant will not object to the combination or consolidation of the two cases for such plenary consideration as may be granted. The present plaintiff-appellant hereby incorporates by reference all of the matters presented in the Jurisdictional Statement filed in that case.

contacts otherwise required under the Due Process Clause.[2] On the contrary, and as the remaining text will make clear, the court below has itself confirmed that where, as here, the parties have come together in a contractual relationship, there is at least one additional and less onerous means of avoiding the tolling statute.

In *Searle*, this court held that the New Jersey statute did not violate the Equal Protection or Due Process Clauses of the Fourteenth Amendment, even though it operated to the disadvantage of foreign corporations having no in-state representative legally authorized to accept service. The *Searle* majority ruled that although such corporations were subject to out-of-state service under the New Jersey long-arm statute, the tolling statute was nevertheless rationally related to legitimate governmental ends. One of the reasons given was that such corporations might be "potentially difficult to locate" even though there was no such problem with respect to the defendant in that particular lawsuit (455 U.S. at 410). Another reason was that the statutory preconditions for invoking the long-arm procedure made it more burdensome than conventional in-state service. (*Id.*).

With respect to the remaining question of whether the New Jersey statute impermissibly burdened interstate commerce—which was the dispositive issue in the present case in both of the lower court decisions—the *Searle* majority declined to resolve the point for two reasons. One was that the lower courts in that case had not decided the issue. The other reason was that it could not be determined from the record whether registering to do business was the only method by which foreign corporations could gain the benefit of the statute of limitations, or whether the appointment of an in-state representative could be otherwise accomplished "in some manner unexplained to us" (*Id.* at 414). The case was accordingly remanded to determine what New Jersey law actually required in that regard. (*Id.*).

2 *International Shoe Co. v. Washington*, 326 U.S. 310 (1945).

During the same term and on March 8, 1982, this court also disposed of an appeal from a New Jersey state court in *Honda Motor Company, Ltd. v. Coons*, 455 U.S. 996 (1982), by vacating the judgment and remanding the case for further consideration in light of *Searle*. Proceedings after remand eventually led to a declaration by the New Jersey Supreme Court that foreign corporations cannot be represented in New Jersey for purposes of the tolling statute except by duly registering to do business, whereupon that court decided that the statute itself was unconstitutional as a burden on interstate commerce. *Coons v. American Honda Motor Co.*, 94 N.J. 307, 312-16, 463 A.2d 921, 924-25 (1983). It was that decision which Chief Justice Rehnquist insisted should have been reviewed by this Court. His reasons may be summarized as follows:

(1) The "Commerce Clause" precedents relied upon by the New Jersey Supreme Court in invalidating the statute involved dissimilar situations in which foreign corporations had been denied all access to state courts. American Honda, by way of contrast, was merely denied the benefit of the limitations defense. (Honda dissent, 469 U.S. at 1125.)

(2) According to the prior decisions of this Court, the protection of a statute of limitations has never been a "fundamental or natural right", and where it exists it is "provided only by legislative grace". Whether such protection is to be provided, therefore, involves only "a public policy decision about the privilege to litigate." (*Id.* at 1126.)

(3) The burden placed on interstate commerce is not insuperable because an affected corporation may nevertheless "plead laches as a defense to a plaintiff whose tardiness impairs the corporation's ability to defend itself." (*Id.* at 1126.)

(4) The New Jersey decision "provided little discussion of why interstate commerce would actually be impeded" by withholding the limitations defense. For his part the Chief Justice observed, "The impact on interstate commerce here is fairly negligible." (*Id.* at 1126.)

(5) Under applicable precedent, a statute which "regulates even-handedly to effectuate a legitimate local public interest", and which has only an incidental effect on interstate commerce, "will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." (*Id.* at 1126-27.)

The defendant-appellee in this case (Midwesco) maintains that under Ohio law, the tolling statute can be avoided only by registering to do business. Even assuming this is so, however, there at the very least remains for decision the exact same Commerce Clause question which this Court acknowledged was dispositive in *Searle*, and which Chief Justice Rehnquist thought was sufficiently substantial for the grant of certiorari in *Honda*.

It also seems clear, however, that the federal question here presented is not as limited as Midwesco would have it appear, and not as limited as the issue in *Honda*. Here an additional federal question arises from the fact that the lower courts essentially disregarded the teaching of *Searle* by failing to determine what means actually existed for complying with the Ohio tolling statute and by simply assuming, with no ruling from the Ohio courts and no independent factual analysis, that the effect of the tolling statute was forced licensure to do business.

Somewhat confoundingly, however, the Court of Appeals also conceded, in response to Bendix' argument, that if Midwesco had designated an agent for the service of process as part of its private contract with Bendix, that designation would have been effective. At that point, and in further disregard of the *Searle* precedent, the Court of Appeals dismissed the

availability of that procedure as unrelated to the Commerce Clause issue.[3] What the court should have acknowledged was that designation by private contract, since it need not have been a general designation operating for the benefit of other claims or other claimants, would not merely have reduced the burden on commerce, but rendered it nonexistent. There is no question, moreover, that under Ohio law, "if a foreign corporation has placed itself in such a position that it may be served with process [within the state], it may avail itself of the statute of limitations when sued." *Title Guaranty and Surety Co. v. McAllister*, 180 Ohio St. 537, 200 N.E. 831, 835 (1936).

The Court of Appeals also failed to effectively resolve what *Searle* identified as the controlling question, *i.e.*, whether compliance with the tolling statute could have been achieved simply by filing a notice with the Secretary of State. In sharp contrast to the situation in New Jersey as it existed at the time of *Searle*, where the record included a letter from the Secretary of State advising that New Jersey offered no procedure for designating an agent apart from the registration statute (*Id.*, 455 U.S. at 417—separate opinion of Powell, J.), the Ohio Secretary of State's office furnished a letter specifically declaring that it will "accept the proposed designation of agent without requiring the foreign corporation to obtain a license", after first determining by "thorough investigation" that the unlicensed corporation is "truly interstate in nature".[4]

The Court of Appeals, instead of demanding proof that licensure to do business was the only means of avoiding the tolling statute, treated the putative existence of an alternative filing procedure as a mere argument which Bendix had failed to prove. If in fact the Court of Appeals was unable to conclusively resolve the state law issue, as its opinion suggests was the case, it should have followed this Court's example in

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3 The relevant text of the decision reads in part: "While we acknowledge that Midwesco could have chosen to name an agent as part of its contract with Bendix, this fact alone in no way solves the problem of whether the tolling statute violates the commerce clause." (820 F.2d at 189.)

4 See Appendix, pp. 22a-23a.

Searle and protested that in the absence of definite knowledge as to what filing procedures were available and what burdens they entailed, the issue of whether there was an impermissible burden on commerce could not be decided.

There is also a substantial question as to the correctness of the Court of Appeals' refusal to consider whether the decision invalidating the tolling statute should have been applied only on a prospective basis. The basis for the refusal was that the issue had been raised only in Bendix' reply brief and not in its main brief.

CONCLUSION

Plenary consideration should be granted with briefs on the merits and oral argument.

Respectfully submitted,

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APPENDIX

Opinion of the United States Court of Appeals for the Sixth Circuit
(Reported at 820 F.2d 186)

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

No. 85-3784

Decided and Filed June 3, 1987

BENDIX AUTOLITE CORPORATION,
Plaintiff-Appellant,

v.

MIDWESCO ENTERPRISES, INC.,
Defendant/Third-Party,
Plaintiff-Appellee,

INTERNATIONAL BOILER WORKS COMPANY,
Third-Party Defendant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO

Before:

MARTIN, JONES, and MILBURN,
Circuit Judges.

BOYCE F. MARTIN, JR., *Circuit Judge*. Bendix Autolite Corporation appeals the grant of summary judgment to Midwesco Enterprises, Inc. in this diversity contract dispute. Bendix claims the district court erred in finding that Ohio's

tolling statute imposes an impermissible burden on interstate commerce. For the following reasons, we affirm.

Bendix is a Delaware corporation with its principal place of business in Ohio. Midwesco is an Illinois corporation with its principal place of business in Illinois. Midwesco is not authorized to do business in Ohio, has no corporate office or facility in Ohio, and has not appointed an agent for service of process in Ohio.

Bendix and Midwesco entered into a contract in August 1974 whereby Midwesco would supply and install a coal-fired boiler system at a Bendix facility in Fostoria, Ohio. Bendix, dissatisfied with the system, filed suit in December 1980 claiming Midwesco improperly installed the boiler and knowingly installed a system that was too small to produce the quantity of steam specified in the contract.

Midwesco moved for summary judgment arguing that Bendix's action was barred by Ohio's statute of limitations. Ohio allows four years for bringing claims for breach of contract for the sale of goods and four years for claims for fraud. Ohio Rev. Code §§ 1302.98, 2305.09(c).

Midwesco raised two arguments in its motion, both concerning the applicability of Ohio's saving clause which reads:

> When a cause of action accrues against a person, if he is out of state, or has absconded, or conceals himself, the period of limitation for the commencement of the action as provided in sections 2305.04 to 2305.14, inclusive, and sections 1302.98 and 1304.29 of the Revised Code, does not begin to run until he comes into the state or while he is so absconded or concealed. After the cause of action accrues if he departs from the state or absconds or conceals himself, the time of his absence or concealment shall not be computed as any part of a period within which the action must be brought.

Id. § 2305.15.

First, Midwesco contended that the statute was inapplicable because Midwesco was, in effect, present in Ohio during the relevant period. Midwesco claimed that because it was contin-

tually subject to the long arm jurisdiction of the Ohio courts, it should be considered within the state for purposes of the statute. Second, Midwesco argued that the statute was inapplicable because it imposed an impermissible burden on interstate commerce in violation of the Constitution. The district court rejected Midwesco's first argument but granted summary judgment on the ground that the tolling statute is unconstitutional.

A court may determine whether a state statute violates the commerce clause by employing either a balancing test or a *per se* rule. The balancing approach is appropriate in instances where there is no patent discrimination against interstate trade and where other legislative objectives are credibly advanced. As the Supreme Court explained in *Philadelphia v. New Jersey*:

> Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits . . . . If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.

437 U.S. 617, 624 (1978) (quoting *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970)).

In other instances, the burden on interstate commerce is deemed so direct and substantial that the Court has said it is unnecessary to balance the competing interests and has ruled state statutes to be *per se* violations of the commerce clause. *See South Carolina Highway Dept. v. Barnwell Bros., Inc.*, 303 U.S. 177, 184 n.2 (1938). The *per se* rule is commonly applied when state regulations discriminate against foreign corporations engaged exclusively in interstate commerce merely because they have failed to qualify to do business in the state. *See Allenberg Cotton Co., Inc. v. Pittman*, 419 U.S. 20 (1974);

Dahnke-Walker Milling Co. v. Bondurant, 257 U.S. 282 (1921).

The district court relied on two recent cases in deciding that Ohio's statute is unconstitutional. In *Coons v. American Honda Motor Co.*, 94 N.J. 307, 463 A.2d 921 (1983), the New Jersey Supreme Court reviewed a tolling statute similar to Ohio's.[1] The court first determined that in order to be "represented" in New Jersey within the meaning of the statute, a corporation had to be licensed to do business in the state. The court then held the statute to be a *per se* violation of the commerce clause, stating that:

> [t]he legislature cannot accomplish indirectly that which it could not do directly; it cannot, in effect, force licensure on foreign corporations dealing exclusively in interstate commerce by otherwise preventing them from gaining the benefit of the statute of limitations defense. The burden thus imposed on interstate commerce is unconstitutional.

463 A.2d at 927.

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1 N.J. Stat. § 2A:14-22 (1984) reads in pertinent part:

> If any person against whom there is any of the causes of action specified . . . is not a resident of this state when such cause of action accrues, or removes from this state after the accrual thereof and before the expiration of the times limited in said sections, or if any corporation or corporate surety not organized under the laws of this state, against whom there is such a cause of action, is not represented in this state by any person or officer upon whom summons or other original process may be served, when such cause of action accrues or at any time before the expiration of the times so limited, the time or times during which such person or surety is not residing within this state or such corporation or corporate surety is not so represented within this state shall not be computed as a part of the periods of time within which such an action is required to be commenced by the section. The person entitled to any such action may commence the same after the accrual of the cause therefor, within the period of time limited therefor by said section, exclusive of such time or times or nonresidence or nonrepresentation.

In *McKinley v. Combustion Engineering, Inc.*, 575 F.Supp. 942 (D. Idaho 1983), the court dealt with a tolling statute that required corporations to meet certain provisions prior to receiving the benefits of the statute of limitations.[2] These provisions demanded that corporations record articles of incorporation with the Secretary of State prior to doing business in Idaho and that foreign corporations designate a person within the state for service of process. Idaho Code 30-501, 30-502 (repealed 1979).

The court, using a balancing test, found the statute to be unconstitutional. *McKinley*, 575 F.Supp. at 947-48. It declined to use a *per se* analysis because under Idaho case law interpreting Idaho legislative intent, the statute could not be construed as applying only to firms engaged exclusively in interstate commerce. *Id.* at 945. The court noted, however, that the statute would have also clearly violated the commerce clause if the *per se* rule had been applied.

We agree with the district court that the reasoning of *Coons* and *McKinley* should be applied to the case at hand. The Ohio tolling statute, like those of New Jersey and Idaho,

> places the foreign corporation in the . . . difficult position of having to choose between exposing itself to personal jurisdiction in [state] courts by complying with the tolling statute, or, by refusing to comply, to remain liable in perpetuity for all lawsuits containing state causes of action filed against it in [the state].

McKinley, 575 F.Supp. at 945. We find this burden placed on firms engaged exclusively in interstate commerce to be a *per se* violation of the commerce clause.

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2 Idaho Code 30-509 (repealed 1979) read:

> Every such corporation which fails to comply with the provisions of this chapter shall be denied the benefit of the statutes of the state limiting the time for the commencement of civil actions, and any limitations in such statutes shall only run in favor of any such corporations during such time as such person duly designated, as aforesaid, upon whom such service can be made, shall be within the state.

Bendix argues that we need not find the statute unconstitutionally burdensome because foreign corporations may, in fact, appoint an agent to receive process in Ohio without formally registering to do business in the state. It offers two methods for accomplishing this: 1) designating an agent by contract, and 2) giving notice to the Secretary of State. We find neither of these arguments persuasive. While we acknowledge that Midwesco could have chosen to name an agent as part of its contract with Bendix, this fact alone in no way solves the problem of whether the tolling statute violates the commerce clause. With regard to Bendix's suggestion that a corporation may merely notify the Secretary of State of its designated representative, we note simply that this argument is highly speculative and devoid of any statutory support.

Next, Bendix contends that the district court erred by unnecessarily deciding the constitutional issue. We disagree. Bendix had initially claimed that because Midwesco promised but failed to repair the boiler system over a four year period Midwesco should be estopped from asserting the statute of limitations defense. The district court rejected this argument because Bendix failed to produce affidavits in support of its allegations. Therefore, we find that because the district court first considered the state law issue, it did not err in deciding the constitutional question.

Finally, Bendix argues that in the event the destrict court is affirmed on the constitutional issue, the ruling should be given only prospective effect. Bendix raises this claim for the first time in its reply brief and, consequently, we refuse to consider it now. *Thompson v. C.I.R.*, 631 F.2d 642 (9th Cir. 1980). "The general rule is that appellants cannot raise a new issue for the first time in their reply briefs." *Id.* at 649.

The decision of the district court is affirmed.

Memorandum and Order of the United States District Court for the Northern District of Ohio, Western Division
(Filed March 8, 1984)

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

Case No. C 80-750

BENDIX AUTOLITE CORPORATION,

Plaintiff

vs.

MIDWESCO ENTERPRISES, INC., et al.,

Defendants

MEMORANDUM AND ORDER

POTTER, J.:

This matter is before the Court on defendant Midwesco Enterprises, Inc.'s (hereinafter Midwesco) motion for summary judgment and plaintiff Bendix Autolite Corporation's (hereinafter Bendix) opposition thereto, defendants' reply and plaintiff's supplemental response. Bendix commenced this action against Midwesco on December 19, 1980 based on a contract between Bendix and Midwesco entered into on August 2, 1974. Pursuant to the contract Midwesco was to supply and install a coal-fired boiler system of specified output at a Bendix facility in Fostoria, Ohio. Bendix asserts that Midwesco improperly installed the boiler system, and knowingly installed a boiler system which was too small to produce the quantity of steam specified in the contract. Count I of the plaintiff's complaint

seeks damages for breach of contract and Count II sounds in fraud. This Court has jurisdiction pursuant to 28 U.S.C. § 1332.

This Court in a memorandum and order filed April 27, 1983 denied that portion of defendant Midwesco's motion for summary judgment which argued that plaintiff's action was time barred under the statute of limitations. This Court reserved the issue of whether the Ohio Tolling Statute, O.R.C. § 2305.15, imposed an impermissible burden on interstate commerce and whether O.R.C. § 2305.15 violated the due process clause of the Fourteenth Amendment Because this Court was to hear oral argument on these same issues in the case of Copley v. Heil-Quaker, No. C 82-512, the Court permitted the parties to participate in that hearing. The issues herein are presented on the pleadings, memoranda, affidavits and oral arguments.

Defendant Midwesco has argued that the provisions of O.R.C. § 2305.15 violate the Commerce Clause under either a *per se* or a balancing test. Defendant Midwesco also has argued that O.R.C. § 2305.15 violates the due process clause of the Fourteenth Amendment because a state cannot regulate foreign corporations doing business within the state's borders by imposing conditions on the corporation which require relinquishment of constitutional rights.

The Court will first consider defendant Midwesco's arguments regarding the Commerce Clause. The Supreme Court has applied two tests in analyzing whether a state statute violates the Commerce Clause. The Supreme Court has held that certain state statutes impose burdens on interstate commerce which are so substantial, direct and unjustified that the Supreme Court has held that the state statute is *per se* violative of the Commerce Clause. *Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978); *Allenberg Cotton Company v. Pittman*, 419 U.S. 20 (1974); *Pike v. Brice Church, Inc.*, 397 U.S. 137, 142 (1970). The second test is a balancing test. If a state statute regulates even handedly and imposes only incidental burdens on interstate commerce, the state statute may still be found to violate the Commerce Clause if the burden imposed on interstate commerce is clearly excessive when balanced against the

benefit to the state of the statute. *Pike v. Brice Church, Inc.*, *supra*, at 142. In applying the balancing test, the nature of the local interest and whether this interest can be promoted as well with a lesser impact on interstate commerce should be considered. *Pike v. Brice Church, Inc.*, *supra*, at 142.

Two courts have recently considered statutes of other states which contained similar provisions as O.R.C. § 2305.15 and have found these provisions violated the Commerce Clause. In *Coons v. American Honda Motor Company, Inc.*, 94 N.J. 307, 463A2d 921 (1983), the New Jersey Supreme Court held that New Jersey's tolling statute, *N.J.S.A.* 2A:14-22, was unconstitutional.

The issue in *Coons* arose when the United States Supreme Court, after initially agreeing to hear the appeal of one of the parties, remanded the case to the New Jersey court because of its decision in *G. D. Searle Co. v. Cohn*, 455 U.S. 404 (1982). In *Searle* the Supreme Court held that tolling provisions such as those contained in *N.J.S.A.* 2A:14-22 or O.R.C. § 2305.15 do not violate the Equal Protection Clause. However, because of ambiguities in state law, the Supreme Court remanded the issue to state court for consideration of the issue of whether such provisions violate the Commerce Clause.

The New Jersey Supreme Court first held that neither the statutes nor the Court rules permit a corporation to appoint a representative to receive service of process without registering to do business in the state, and that any attempt to so file with the Secretary of State must be without effect. The Court then held that since the tolling statute mandates licensing in New Jersey in order to get its benefits the statute violates the Commerce Clause. In reaching this conclusion, the court relied on a series of Supreme Court decisions which have found a per se violation of the Commerce Clause where a state has discriminated against a foreign corporation engaged in interstate commerce merely because it has failed to do business in that state.

In a footnote the court in *Coons* indicates that even if it applied a balancing test, it would still find that the provisions of *N.J.S.A.* 2A:14-22 violate the Commerce Clause. According

to the court, the burdens attached to the requirement of obtaining certification to register to do business to avoid the tolling of the statute of limitations outweigh the benefits arising from the tolling provision.

The other court which has recently ruled upon this issue is the United States District Court for the District of Idaho in *Richard Dean McKinley v. Combustion Engineering, Inc., et al.*, Civil No. 80-4045, filed November 15, 1983. In *McKinley* the court had dismissed the plaintiff's wrongful death claims on the grounds they were barred by the statute of limitations. The dismissal was appealed to the Ninth Circuit. The Ninth Circuit, because of the Supreme Court's decision in *G. D. Searle & Co. v. Cohn*, *supra*, remanded the case to the district court for a decision on whether a former provision of Idaho Code 30-509 violated the Commerce Clause. The provisions of Idaho Code 30-509 were as follows:

> *Statute of limitations.*—Every such corporation which fails to comply with the provisions of this chapter shall be denied the benefit of the statutes of the state limiting the time for the commencement of civil actions, and any limitations in such statutes shall only run in favor of any such corporations during such time as such person duly designated, as foresaid, upon whom such service can be made, shall be within the state.

Subsequent to the filing of the lawsuit, this statute was repealed.

The court in *McKinley* first discussed the court's decision in *Coons*. The court in *McKinley* then examined Idaho law in order to determine the burden which the Idaho tolling statute placed upon foreign corporations. The court found that the tolling statute forced foreign corporations in Idaho to choose between either exposing itself to personal jurisdiction in the Idaho courts by complying with the tolling statute or being liable in perpetuity for all lawsuits filed against it under Idaho state law. The court in *McKinley* agreed with the court in *Coons* that if a *per se* rule was employed the burden imposed by the tolling statutes on foreign corporations would violate

the Commerce Clause. According to the court in *McKinley*, however, a *per se* rule was inapplicable because under existing Idaho case law the tolling statute could not be found to apply to firms engaged exclusively in interstate commerce.

The court in *McKinley* therefore utilized a balancing test and analyzed whether the burdens on interstate commerce imposed by the Idaho tolling statute outweigh the benefits of the statute. The court rejected the argument that no real burden was imposed upon a foreign corporation by forcing it to register in order to avoid forever being liable on state causes of action because a foreign corporation was already subject to personal jurisdiction under the Idaho long arm statute. According to the court in *McKinley*, the law on minimum contacts is not crystal clear. The standards which the courts have utilized in determining whether personal jurisdiction exists raise questions regarding "what constitutes substantial activities," "when will a single act be sufficient" and "what is reasonable." Therefore, foreign corporations doing business in Idaho may have an arguable defense based upon lack of personal jurisdiction. The provisions of Idaho Code 30-509 require a corporation to waive this defense and therefore impose a real burden upon foreign corporations which seek to avoid perpetual liability in Idaho.

The court in *McKinley* found that the benefit of requiring foreign corporations to appoint in-state representatives for service of process purposes is to make it easier for Idaho residents to effect service on a foreign corporation, resulting in a time and cost savings. According to the court in *McKinley*, this benefit, however, is outweighed by the burden of waiving a legal defense. A successful motion to dismiss for lack of personal jurisdiction can end possibly protracted litigation.

In addition, the court found that the benefits of the Idaho tolling statute could have been obtained through less onerous means. Corporations could have been required to file with the Secretary of State the location and address of its representative for service of process purposes.

The *McKinley* court therefore found:

> . . . that a statutory scheme that in essence requires foreign corporations to waive a legal defense places a serious burden on interstate commerce. These statutes do provide benefits to Idaho residents, but the same benefits could be realized through less onerous means. But even if less onerous means were not available, the Court would still find, for the reasons previously discussed, that the burdens placed on interstate commerce by the Idaho tolling statutes are clearly excessive when compared to the benefits obtained by those statutes.
>
> For all of the above reasons, the Court finds that Idaho Code 30-509 was unconstitutional under the Commerce Clause during the time that it was in effect prior to its repeal in 1979.

Richard Dean McKinley v. Combustion Engineering, Inc., supra at 13-14.

This Court agrees with the analysis of the *Coons* court and the court in *McKinley*. Regardless of whether the provisions of O.R.C. § 2305.15 are analyzed under a *per se* test or a balancing test, this provision, as applied to defendant Midwesco, violates the Commerce Clause. Under the *per se* test this provision violates the Commerce Clause by forcing interstate corporations to obtain a license in order to obtain the benefit of the statute of limitations defense. Under the balancing test, the burden of having to obtain a license and therefore waiving a possible defense of lack of personal jurisdiction outweighs the benefits to potential litigants of making service of process easier to obtain on corporations engaged solely in interstate commerce. The Court therefore finds that the provisions of O.R.C. § 2305.15 are unconstitutional, as applied to defendant Midwesco, because they violate the Commerce Clause.

Having found that the provisions of O.R.C. § 2305.15 violate the Commerce Clause, the Court does not reach defendant Midwesco's due process arguments.

Finally, plaintiff has argued that defendant Midwesco should be estopped from asserting a statute of limitations defense because defendant Midwesco promised over a four year period to repair defects in the boiler system and failed to do so. Plaintiff alleges that it reasonably relied upon defendant Midwesco's representations in forebearing to institute this lawsuit. Plaintiff also argues that under Ohio law the statute of limitations on fraud does not begin to run until the fraud is discovered. According to plaintiff, it first learned of defendant Midwesco's fraud in knowingly installing a boiler system which did not meet specifications on August 24, 1979. Therefore, plaintiff argues that its action filed December 19, 1980 was filed well within the four year statute of limitations for fraud.

As defendant points out, plaintiff has failed to support these arguments with any affidavits which establish that genuine issues of material fact exist on either the issue of estoppel or fraud. Therefore, the Court finds that no genuine issue on either of these arguments exists for trial. See Fed.R.Civ.P. 56(e).

THEREFORE, for the foregoing reasons, good cause appearing, it is

ORDERED that defendant Midwesco's motion for summary judgment be, and hereby is, DENIED in part and GRANTED in part; and it is

FURTHER ORDERED that plaintiff's claims against defendant Midwesco be, and hereby are, dismissed; and it is

FURTHER ORDERED that this cause be, and hereby is, set for pretrial on defendant Midwesco's third party claims on March 19, 1984 at 11:30 A.M.

/s/ JOHN W. POTTER
United States District Judge

Memorandum and Order of the United States District Court for the Northern District of Ohio, Western Division, in the companion case of *Copley v. Heil-Quaker Corp.*
(Filed March 8, 1984)

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

Case No. C 82-512

WILLIAM COPLEY, et al.,

Plaintiffs

vs.

HEIL-QUAKER CORP., et al.,

Defendants

MEMORANDUM AND ORDER

POTTER, J.:

This matter is before the Court on defendant Heil-Quaker Corporation's (hereinafter "Heil-Quaker") motion to dismiss and plaintiffs' opposition thereto, defendant Heil-Quaker's reply, plaintiffs' response, opposition of Bendix *amicus curiae* to defendant's motion to dismiss, reply by defendant Heil-Quaker, further opposition by Bendix, supplemental response of plaintiffs and defendant Heil-Quaker's supplemental response.

Subsequent to the filing of these motions, the Court has become aware of another case on its docket, William Copley, et al., v. Honeywell, Inc., et al., No. C 83-682. This case was transferred to this Court from the District of Minnesota,

Fourth Division, pursuant to the provisions of 28 U.S.C. § 1404(a). Plaintiffs have filed substantially the same claims with that Court as they filed in the case sub judice. Therefore, the Court will order that Case Nos. C 83-682 and C 82-512 be consolidated.

A hearing was held on defendant Heil-Quaker's motion for summary judgment on May 20, 1983. The issues herein were presented on the pleadings, memoranda, affidavits and oral arguments.

This action arises out of a gas explosion that occurred on December 12, 1975. Plaintiffs William Copley and Patsy Copley are husband and wife, and are the parents of plaintiff Dale Copley who was born on December 2, 1958. All three plaintiffs are residents and citizens of the State of Ohio.

The complaint herein was filed on August 24, 1982. As amended, it alleges that in 1967 plaintiffs William and Patsy Copley purchased a furnace manufactured by Heil-Quaker and installed it in their home. It further alleges that on December 12, 1975, serious injuries were inflicted upon the plaintiffs by a gas explosion allegedly caused by a malfunction of the furnace. The plaintiffs allege that Heil-Quaker manufactured the furnace and negligently incorporated a defective and malfunctioning control or valve which directly and proximately resulted in the injuries and damages sustained by the plaintiffs. The allegedly defective gas control or valve was manufactured by Honeywell, incorporated into the furnace manufactured by Heil-Quaker and sold to the plaintiffs by Sears.

Heil-Quaker is a Delaware corporation having its principal place of business in Tennessee and manufactures furnaces, central air conditioning equipment, heat pumps, and parts thereof. Its manufacturing operations are conducted only in the State of Tennessee, and the products it manufactures there are shipped for resale to purchasers located in every state of the United States, including Ohio. Heil-Quaker is licensed to do business and has appointed agents for service of process upon it only in Delaware and Tennessee.

No place of business, officer, managing agent or general agent of Heil-Quaker is located in the State of Ohio. From time to time, sales representatives of Heil-Quaker call on customers in Ohio to promote the sale of the company's products, sometimes taking orders subject to acceptance at the company's office in Tennessee. A service representative of Heil-Quaker also calls on customers in Ohio from time to time. Affidavit of Charles L. Shattuck.

Relief against Heil-Quaker is sought by the first, second, third and fourth causes of action which seek to recover for personal injuries to William and Dale Copley, their lost past and future earnings and medical expenses, Patsy Copley's loss of the consortium of her husband, and William and Patsy Copley's loss of services of Dale Copley.

All of the claims against Heil-Quaker seek recovery for bodily injury and its consequences and are, therefore, subject to O.R.C. § 2305.10 which provides in pertinent part:

> An action for bodily injury . . . shall be brought within two years after the causes thereof arose.

The explosion which caused the bodily injuries occurred on December 12, 1975, and plaintiffs William and Patsy Copley therefore had two years to assert their claims against Heil-Quaker, until December 12, 1977. Since Dale Copley was born on December 2, 1958, he was seventeen years old and a minor on the date of the explosion. O.R.C. § 2305.16 provides that, as to him, the two-year period of limitations would commence to run when his minority terminated. Thus his time to assert his claim against Heil-Quaker was two years from his eighteenth birthday. O.R.C. § 3109.01. He became eighteen on December 2, 1976 and thus had until December 2, 1978 to assert his claims against Heil-Quaker.

Clearly, the plaintiffs' claims against Heil-Quaker were too late when this action was filed on August 24, 1982 and would be barred without the effect of the Ohio savings clause, O.R.C. § 2305.15. That section provides in pertinent part:

> When a cause of action accrues against a person, if he is out of state, or has absconded, or conceals himself, the period of limitation for the commencement of the action as provided in sections 2305.04 to 2305.14, inclusive, . . . does not begin to run until he comes into the state or while he is so absconded or concealed. . . .

This provision has been construed to toll limitations when the defendant, including a corporate defendant, is not amenable to personal service of process within the borders of the State of Ohio, even though continuously amenable to "long-arm" service outside the state. *Seeley v. Expert, Inc.*, 26 Ohio St.2d 61, 269 N.E.2d 121 (1971); *Ohio Brass Company v. Allied Products Corporation*, 339 F. Supp. 417 (N.D. Ohio 1972). Heil-Quaker argues that § 2305.15, as construed in Ohio and as applied to a corporation in the position of Heil-Quaker violates the Due Process Clause of the Fourteenth Amendment and the Commerce Clause.[1]

Heil-Quaker asserts that § 2305.15 violates the Due Process Clause because it conditions the benefit of the limitation period upon the appointment of an Ohio agent. Heil-Quaker asserts that the only way a foreign corporation can appoint an agent for service of process is to register to do business pursuant to O.R.C. § 1703.04. Such registration to do business and appointment of an agent would subject it to suit in Ohio when there otherwise would not be the minimum contact required for suit in Ohio. Under the Due Process Clause and the "minimum contacts" rule of *International Shoe Co. v. Washington*, 326 U.S. 310, (1945), Heil-Quaker further argues that § 2305.15 violates the Due Process requirement of notice and fair warning because the contradictory nature of the Ohio laws, specifically § 1703.02 and § 2305.15, constitute a trap for unwary sellers.

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1 The argument that the provisions of O.R.C. § 2305.15 violate the Due Process Clause and the Commerce Clause of the United States Constitution were not considered by the Ohio Supreme Court in *Seeley*.

Heil-Quaker also asserts that § 2305.15 violates the Commerce Clause prohibition of discrimination against interstate firms solely because of the interstate nature of their businesses. Finally, Heil-Quaker argues that § 2305.15 violates the Commerce Clause requirement that any burden imposed upon commerce be justified by a countervailing local interest.

The Court will first consider defendant Heil-Quaker's arguments regarding the Commerce Clause. The Supreme Court has applied two tests in analyzing whether a state statute violates the Commerce Clause. The Supreme Court has held that certain state statutes impose burdens on interstate commerce which are so substantial, direct and unjustified that the Supreme Court has held that the state statute is *per se* violative of the Commerce Clause. *Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978); *Allenberg Cotton Company v. Pittman*, 419 U.S. 20 (1974); *Pike v. Brice Church, Inc.*, 397 U.S. 137, 142 (1970). The second test is a balancing test. If a state statute regulates even handedly and imposes only incidental burdens on interstate commerce, the state statute may still be found to violate the Commerce Clause if the burden imposed on interstate commerce is clearly excessive when balanced against the benefit to the state of the statute. *Pike v. Brice Church, Inc.*, *supra*, at 142. In applying the balancing test, the nature of the local interest and whether this interest can be promoted as well with a lesser impact on interstate commerce should be considered. *Pike v. Brice Church, Inc.*, *supra*, at 142.

Two courts have recently considered statutes of other states which contained similar provisions as O.R.C. § 2305.15 and have found these provisions violated the Commerce Clause. In *Coons v. American Honda Motor Company, Inc.*, 94 N.J. 307, 463A2d 921 (1983), the New Jersey Supreme Court held that New Jersey's tolling statute, *N.J.S.A.* 2A:14-22, was unconstitutional.

The issue in *Coons* arose when the United States Supreme Court, after initially agreeing to hear the appeal of one of the parties, remanded the case to the New Jersey court because of its decision in *G. D. Searle Co. v. Cohn*, 455 U.S. 404 (1982). In *Searle* the Supreme Court held that tolling provisions such

as those contained in *N.J.S.A.* 2A:14-22 or O.R.C. § 2305.15 do not violate the Equal Protection Clause. However, because of ambiguities in state law, the Supreme Court remanded the issue to state court for consideration of the issue of whether such provisions violate the Commerce Clause.

The New Jersey Supreme Court first held that neither the statutes nor the Court rules permit a corporation to appoint a representative to receive service of process without registering to do business in the state, and that any attempt to so file with the Secretary of State must be without effect. The Court then held that since the tolling statute mandates licensing in New Jersey in order to get its benefits the statute violates the Commerce Clause. In reaching this conclusion, the court relied on a series of Supreme Court decisions which have found a per se violation of the Commerce Clause where a state has discriminated against a foreign corporation engaged in interstate commerce merely because it has failed to do business in that state.

In a footnote the court in *Coons* indicates that even if it applied a balancing test, it would still find that the provisions of *N.J.S.A.* 2A:14-22 violate the Commerce Clause. According to the court, the burdens attached to the requirement of obtaining certification to register to do business to avoid the tolling of the statute of limitations outweigh the benefits arising from the tolling provision.

The other court which has recently ruled upon this issue is the United States District Court for the District of Idaho in *Richard Dean McKinley v. Combustion Engineering, Inc., et al.*, Civil No. 80-4045, filed November 15, 1983. In *McKinley* the court had dismissed the plaintiff's wrongful death claims on the grounds they were barred by the statute of limitations. The dismissal was appealed to the Ninth Circuit. The Ninth Circuit, because of the Supreme Court's decision in *G. D. Searle & Co. v. Cohn*, *supra*, remanded the case to the district court for a decision on whether a former provision of Idaho Code 30-509 violated the Commerce Clause. The provisions of Idaho Code 30-509 were as follows:

> *Statute of limitations.* — Every such corporation which fails to comply with the provisions of this chapter shall be denied the benefit of the statutes of the state limiting the time for the commencement of civil actions, and any limitations in such statutes shall only run in favor of any such corporations during such time as such person duly designated, as foresaid, upon whom such service can be made, shall be within the state.

Subsequent to the filing of the lawsuit, this statute was repealed.

The court in *McKinley* first discussed the court's decision in *Coons*. The court in *McKinley* then examined Idaho law in order to determine the burden which the Idaho tolling statute placed upon foreign corporations. The court found that the tolling statute forced foreign corporations in Idaho to choose between either exposing itself to personal jurisdiction in the Idaho courts by complying with the tolling statute or being liable in perpetuity for all lawsuits filed against it under Idaho state law. The court in *McKinley* agreed with the court in *Coons* that if a *per se* rule was employed the burden imposed by the tolling statutes on foreign corporations would violate the Commerce Clause. According to the court in *McKinley*, however, a *per se* rule was inapplicable because under existing Idaho case law the tolling statute could not be found to apply to firms engaged exclusively in interstate commerce.

The court in *McKinley* therefore utilized a balancing test and analyzed whether the burdens on interstate commerce imposed by the Idaho tolling statute outweigh the benefits of the statute. The court rejected the argument that no real burden was imposed upon a foreign corporation by forcing it to register in order to avoid forever being liable on state causes of action because a foreign corporation was already subject to personal jurisdiction under the Idaho long arm statute. According to the court in *McKinley*, the law on minimum contacts is not crystal clear. The standards which the courts have utilized in determining whether personal jurisdiction exists raise questions regarding "what constitutes substantial activities," "when will a single act be sufficient" and "what is reasonable." Therefore, foreign corporations doing business in Idaho may have an arguable defense based upon lack of personal jurisdiction. The provisions of Idaho Code 30-509 require a corporation to waive this defense and therefore impose a real burden upon foreign corporations which seek to avoid perpetual liability in Idaho.

The court in *McKinley* found that the benefit of requiring foreign corporations to appoint in-state representatives for service of process purposes is to make it easier for Idaho residents to effect service on a foreign corporation, resulting in a time and cost savings. According to the court in *McKinley*, this benefit, however, is outweighed by the burden of waiving a legal defense. A successful motion to dismiss for lack of personal jurisdiction can end possibly protracted litigation.

In addition, the court found that the benefits of the Idaho tolling statute could have been obtained through less onerous means. Corporations could have been required to file with the Secretary of State the location and address of its representative for service of process purposes.

The *McKinley* court therefore found:

> . . . that a statutory scheme that in essence requires foreign corporations to waive a legal defense places a serious burden on interstate commerce. These statutes do provide benefits to Idaho residents, but the same benefits could be realized through less onerous means. But even if less onerous means were not available, the Court would still find, for the reasons previously discussed, that the burdens placed on interstate commerce by the Idaho tolling statutes are clearly excessive when compared to the benefits obtained by those statutes.
>
> For all of the above reasons, the Court finds that Idaho Code 30-509 was unconstitutional under the Commerce Clause during the time that it was in effect prior to its repeal in 1979.

Richard Dean McKinley v. Combustion Engineering, Inc., *supra* at 13-14.

This Court agrees with the analysis of the *Coons* court and the court in *McKinley*. Regardless of whether the provisions of O.R.C. § 2305.15 are analyzed under a *per se* test or a balancing test, this provision, as applied to defendant Heil-Quaker, violates the Commerce Clause. Under the *per se* test this provision violates the Commerce Clause by forcing interstate corporations to obtain a license in order to obtain the benefit of the statute of limitations defense. Under the balancing test, the burden of having to obtain a license and therefore waiving a possible defense of lack of personal jurisdiction outweighs the benefits to potential litigants of making service of process easier to obtain on corporations engaged solely in interstate commerce. The Court therefore finds that the provisions of O.R.C. § 2305.15 are unconstitutional, as applied to defendant Heil-Quaker, because they violate the Commerce Clause.

Plaintiffs have sought to distinguish the court's decision in *Coons* from the case sub judice on the grounds that New Jersey's statutory scheme is dissimilar to Ohio's. Plaintiffs have argued that Ohio's statutory scheme, unlike that of New Jersey, permits Ohio's Secretary of State to accept the appointment of a statutory agent for filing under the provisions of O.R.C. § 111.6. This section provides in pertinent part as follows:

> The Secretary of State shall charge and collect, for the benefit of the state, the following fees:
>
> * * *
>
> (H) For filing any certificate or paper not required to be recorded, the sum of five dollars.

In support of this argument, plaintiffs have attached a letter written by Corporations Counsel for the Secretary of State of Ohio. This letter indicates in part:

> If, after thorough investigation into whether the foreign unlicensed corporation was doing business in Ohio, it is found that the corporation is truly interstate in nature, this office could accept the proposed designation of agent without requiring the foreign corporation to obtain a license.

The court in *Coons* was presented with a similar argument. While the Secretary of State had offered his opinion that no statutory procedure existed for a corporation engaged in interstate commerce to designate an agent without registering to do business in New Jersey, the Attorney General had given his opinion that *N.J.S.A.* 14A:1-6(4) constituted such a provision. The provisions of *N.J.S.A.* 14A:1-6(4) provide in relevant part as follows:

> The Secretary of State shall record all documents, excepting annual reports, which relate to or in any way affect corporations, and which are required or permitted by law to be filed in his office.

The court held that foreign corporations would not be able to file notice with the Secretary under *N.J.S.A.* 14A:1-6(4) because "that statute directs the Secretary to record documents that are filed as required or permitted by law. It does not independently authorize the filing of any documents." *Coons*, *supra*, at 12-13.

Plaintiffs in the present action assert that Ohio's statutory scheme differs significantly from New Jersey's because Ohio's Secretary of State may accept an appointment of a statutory agent for filing pursuant to O.R.C. § 111.16.

The Court finds no merit to plaintiffs' argument. The Court agrees with the New Jersey Court that the mere fact that the Secretary of State can accept a document for filing does not independently authorize the filing of such a document. Any scheme which would permit a corporation engaged solely in interstate commerce to designate an agent for service of process purposes should be enacted by the legislature. Therefore, the Court finds the opinion which plaintiffs obtained from Patricia Mill, Corporations Counsel for the Secretary of State, dated December 22, 1983, to be unpersuasive. As defendant Heil-Quaker points out, under existing Ohio law it is not practicable or realistic to speculate that a corporation engaged

in interstate commerce might surmise that the Secretary of State after thorough investigation might accept the designation of an agent from a corporation which has not registered to do business in Ohio.

In addition, the Court notes that the Secretary of State's opinion on the issue of whether a corporation engaged in interstate commerce can appoint an agent has changed during the course of this litigation. Defendant Heil-Quaker filed its letter also from Patricia Mill, dated September 14, 1983, in which Ms. Mill indicated as follows:

> Pursuant to Section 1703.041 O.R.C., the Ohio Secretary of State may accept for filing a designation of statutory agent only for those foreign corporations which are duly licensed to transact business within the State. A designation of agent filed by a foreign corporation which is not licensed in Ohio would necessarily be rejected by this office due to the provisions of Section 1703.191 O.R.C.

In light of the Court's finding that the provisions of O.R.C. § 2505.10 violate the Commerce Clause, the Court does not reach defendant Heil-Quaker's due process argument. The Court will grant Heil-Quaker's motion to dismiss.

There is also pending in this matter defendant Sears' motion for summary judgment, plaintiffs' opposition thereto, defendant Sears' reply and plaintiffs' response.

Defendant Sears has moved for summary judgment on the grounds that plaintiffs' claims against it are barred by the statute of limitations. According to defendant Sears, plaintiffs failed to bring their claims for bodily injury within the two year statute of limitations set forth in O.R.C. § 2305.11. Defendant Sears successfully made this same argument in C 83-682 in the District Court in Minnesota. That court dismissed plaintiffs' claims against defendant Sears on the grounds that those claims were barred by the applicable provision of the Minnesota statute of limitations.

The Court finds that no genuine issues of fact exist and defendant Sears is entitled to summary judgment as a matter of law on the grounds that plaintiffs' claims against it are barred by the statute of limitations. The applicable statute of limitations is set forth in O.R.C. § 2305.10 which provides in pertinent part as follows:

> An action for bodily injury or injuring personal property shall be brought within two years after the cause thereof arose.

Plaintiffs are clearly seeking to bring an action for bodily injury and not breach of contract. See *Andrianos v. Community Traction Co.*, 155 Ohio St. 47, 97 N.E.2d 49 (1951). The Court rejects plaintiffs' argument that the applicable statute of limitations is set forth in O.R.C. § 2305.07. Even if plaintiffs' arguments regarding the alleged disabilities of plaintiffs Dale and William Copley are accepted as true, plaintiffs failed to initiate their action within the two year period set forth in O.R.C. § 2305.07.

The provisions of the Consumer Product Safety Commission Act, 15 U.S.C. § 2072 et seq., do not establish plaintiffs' right to bring this action. Therefore, the Supreme Court's decision in *Bora v. Kerchelich*, 2 Ohio St.3d 146, 443 N.E. 2d 509 (1983), is inapplicable in the case sub judice.

In addition, as defendant Sears points out, it had no knowledge of the alleged defective nature of the valve manufactured by defendant Honeywell until after plaintiffs filed this action. Therefore, defendant Sears had no duty towards plaintiffs under the provisions of the CPSCA. The Court will grant defendant Sears' motion for summary judgment.

Finally, there is pending in this action defendant Honeywell's motion for summary judgment, plaintiffs' opposition thereto, defendant Honeywell's reply, and plaintiffs' response. Defendant Honeywell has also moved for summary judgment on the grounds that plaintiffs' claims against it are barred by the statute of limitations. Plaintiffs have alleged a private cause of action against defendant Honeywell under Section 23 of the Consumer Product Safety Act, 15 U.S.C. § 2072. Plaintiffs, in

the action they originally filed in Minnesota, alleged negligence, breach of express and implied warranties, and fraudulent concealment against defendant Honeywell. The court in Minnesota originally granted a motion for judgment on the pleadings filed by defendant Honeywell on the grounds that plaintiffs' claims against defendant Honeywell were barred by the statute of limitations. Plaintiffs then filed a motion for reconsideration in which they argued that the statute of limitations had been tolled by defendant Honeywell's fraudulent concealment of certain relevant facts. The District Court in Minnesota vacated its dismissal of plaintiffs' action against defendant Honeywell on the grounds that plaintiffs' case against defendant Honeywell should not be dismissed at the pleading stage and plaintiffs should be given an opportunity to develop it further. Defendant Honeywell then argued that plaintiffs' action should be dismissed on the grounds that plaintiffs, by filing two actions, had split their claims between this Court and the District Court in Minnesota. The District Court in Minnesota denied defendant Honeywell's motion to dismiss and ordered the case transferred to this Court pursuant to the provisions of 28 U.S.C. § 1404(a).

For the reasons previously stated in reference to defendant Sears' motion, the Court finds merit to defendant Honeywell's argument that the statute of limitations governing plaintiffs' claims is set forth in O.R.C. § 2305.10 and that any tolling provisions set forth in O.R.C. § 2305.16 are inapplicable in the case sub judice.

The Court, however, agrees with the Minnesota Court that it would be inappropriate at this stage of the proceedings to grant defendant Honeywell's motion for summary judgment because genuine issues of fact exist on the issue of whether defendant Honeywell fraudulently concealed from plaintiffs its alleged wrongful conduct.

THEREFORE, for the foregoing reasons, good cause appearing, it is

ORDERED that Case No. C 83-682 and the above captioned case be, and hereby are, consolidated; and it is

FURTHER ORDERED that defendant Heil-Quaker's motion for summary judgment be, and hereby is, GRANTED; and it is

FURTHER ORDERED that defendant Sears, Roebuck & Company's motion for summary judgment be, and hereby is, GRANTED; and it is

FURTHER ORDERED that defendant Honeywell, Inc.'s motion for judgment on the pleadings or, in the alternative, summary judgment be, and hereby is, DENIED; and it is

FURTHER ORDERED that this cause be, and hereby is, set for pretrial on March 19, 1984 at 11:00 A.M.

/s/ JOHN W. POTTER
United States District Judge

Notice of Appeal to the Supreme Court of the United States

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Case No. 85-3784

BENDIX AUTOLITE CORPORATION,
Plaintiff-Appellant,

v.

MIDWESCO ENTERPRISES, INC.
Defendant/Third-Party Plaintiff-Appellee.

INTERNATIONAL BOILER WORKS COMPANY,
Third Party Defendant.

PLEASE TAKE NOTICE that Bendix Autolite Corporation, the the above-named plaintiff-appellant, hereby appeals to the Supreme Court of the United States from the final judgment of the United States Court of Appeals for the Sixth Circuit dismissing the complaint entered in this action on June 3, 1987. Specificially, the appeal is taken from the final judgment of the United States Court of Appeals for the Sixth Circuit declaring the Ohio Savings Clause, Ohio Revised Code Section 2305.15, to be in violation of the Commerce Clause of the United States Constitution.

This appeal is taken pursuant to 28 U.S.C. Section 1254(2).

/s/ NOEL C. CROWLEY

Noel C. Crowley
767 Fifth Avenue
New York, New York 10153
Tel. (212) 750-9301
Attorney for Plaintiff-Appellant

Dated: August 26, 1987